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MICHAEL DODAX, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1124

NATHANIEL COLEMAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari
To The United States Court of
Appeals For The Seventh Circuit

REPLY BRIEF

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A8) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on December 18, 1978. The petition for a writ of certiorari was filed on January 17, 1979. The brief in opposition for the United States was filed on March 9, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

I.

ARGUMENT

In point one of its brief the respondent acknowledges that the instant case presents a question of first impression. Then the respondent argues, without any citation to authority, that this reason alone would not justify review by this court (Res. 4). The petitioner would ask the court to note that the respondent misstates the facts because his petition enumerated six reasons for this court to grant the writ of certiorari (Pet. 8-19). The petitioner would also ask the court to note that the respondent failed to consider two constitutional questions raised in the petitioner's brief: (1) whether the Seventh Circuit's decision violated the Thirteenth Amendment's prohibition against slavery when the court held that CETA workers services, which were paid for with federal funds, were property owned by the federal government (Pet. 12-13), and (2) whether the Seventh Circuit's decision violated the prohibition against Ex Post Facto Laws when the court construed the word property in 18 U.S.C. 665 to include services and retrospectively applied its construction of section 665 to the alleged conduct of the accused (Pet. 14). Finally, the petitioner submits that by failing to consider the constitutional questions raised in his brief the respondent sub silentio agrees with the petitioner's position.

The respondent's next argument is that the terms used by Congress do not lend themselves to restrictive interpretation (Res. 4). Petitioner submits that the words in section 665 do lend themselves to a restrictive interpretation. First, section 665 is restricted to people connected with an agency receiving financial assistance. Second, section 665 prohibits the theft of money, funds, assets or property. Third, section 665 applies to money, funds, assets or

property which are the subject of a grant or contract of assistance. The language in section 665 clearly indicates an intention by Congress to restrict the scope of the statute to people connected with an agency receiving financial assistance, and to things which are the subject of a grant or contract of assistance. Finally, if this court examines the contract of assistance (Pet. B. 9), it will discover that money (\$4,627,980), and not the services of the CETA employees, was the subject of the grant or contract of assistance.

Next, the respondent argues that a contractual right to services is a type of wealth similar to other types of property rights (Res. 4). But, the respondent overlooked the fact that the United States never entered into a contract with the CETA workers. The CETA workers applied for jobs with Gary Manpower, a city agency. Therefore, since there was no contract between the United States and the CETA workers, since the CETA workers were not hired by the United States to perform specific jobs (e.g. paint a federal building) for the United States of America, and since the CETA workers had no skills but were deprived persons who needed work experience, the respondent's argument (that a contractual right to services is a type of wealth similar to other kinds of intangible property rights) has no merit.

By making the preceding argument, the respondent skirts the threshold question in a theft of services prosecution: whether the government owned the property, the services of the CETA employees, which the government alleges was stolen in the indictment (Pet. B. 1). Ownership must be established by the respondent in the instant case because it is a material element of the offense of theft.

The government also argues that there is no significant difference between diverting the labor of employees paid

by the federal government and diverting the funds used to pay them (Res. 4-5). Petitioner disagrees with the respondent and submits that there is a significant difference in the two acts. Diverting the labor of CETA employees is not an offense within the purview of section 665. However, diverting the funds used to pay CETA employees is an offense within the purview of section 665. Moreover, the indictment does not allege and the evidence does not establish that the petitioner stole any funds. The only reason the government wants the two distinct acts to be one and the same is so the alleged conduct of the petitioner can be brought within the purview of 18 U.S.C. 665. However, since theft of services is not an offense under 18 U.S.C. 665, the respondent's argument is erroneous and this court should grant certiorari and reverse this case.

The respondent's next argument is that the construction proposed by the petitioner would create a gaping hole in the protection of the integrity of CETA programs (Res. 5). The petitioner disagrees with the respondent's argument because under 29 U.S.C. 982 the Secretary is empowered to withhold funds which are improperly spent by a prime sponsor or an eligible applicant. Section 29 U.S.C. 991 (b) delineates other remedies, civil actions, that are available to the Secretary. By promulgating these two statutes, Congress has clearly enacted legislation to protect CETA money. But, most importantly, an examination of 42 U.S.C. 2706 (3) (Sup. p. X. 1976)¹ establishes that Congress intended to protect financial assistance such as money but did not intend to protect services which were procured with federal money. Therefore, the respondent's argument has no merit.

1. (3) the term "financial assistance" includes assistance advanced by grant, agreement, or contract, but does not include the procurement of plant, or equipment, or goods or services.

The respondent's next argument is that under 18 U.S.C. 641 (the general theft statute) and under 18 U.S.C. 1951 (the Hobbs Act) the term "property" has been construed to include tangible and intangible things (Res. 5). While the term "property" in sections 641 and 1951 may be subject to a broad construction, the term "property" in section 665, the statute under review in this case, is subject to a restrictive construction because the property must be "the subject of a grant or contract of assistance". See 18 U.S.C. 665. And this court will determine, after examining the contract of assistance (Pet. B. 9), that the subject of the contract of assistance was money (tangible property) and not services (intangible property). Consequently, the respondent's argument has no merit.

II.

In point two the respondent argues that the petitioner did not object to the district court's charge in compliance with Fed. R. Crim. P. 30, which required him to "stat(e) distinctly the matter to which he objects and the grounds of the objection" (Res. 7). The respondent also argues that petitioner only objected in general terms. The following objection was made by defense counsel at the trial:

"Mr. Slaughter: We do have objection to the Court's instructions. I would inform the Court that our objections go to the terms which are used throughout the various instructions, those terms being the word "embezzled", the word "misapply", the phrase "obtain by fraud", the words "money, funds or assets". We would indicate to the Court, those terms apply throughout many of the instructions. Not only do we object to the words, we also object because there is no definition for the terms and phrases, other than for the word "embezzled". There is a definition for the word "embezzle".

There are no definitions in the instructions we have of any of the other terms and phrases that we have recited to the Court.

Petitioner submits that the objection stated distinctly the matter to which he objected and the grounds of the objection and, therefore, was in compliance with the Federal Rules of Criminal Procedures.

The respondent also argues that the terms required no further elaboration, and that the terms left undefined by the district court were synonymous with wrongful taking and were well within the common understanding of the jury (Res. 7). If the terms required no further elaboration and if the terms were within the common understanding of the jury, then petitioner wonders why the jury sent the judge a note asking him to clarify embezzlement, the only defined term (Pet. B. 5). The petitioner submits that the jury's note establishes two things: (1) that the jury was confused and (2) that the respondent's argument is devoid of merit. Finally, the petitioner submits that he objected to the court's instructions, therefore, the court's failure to properly instruct the jury violated his substantial rights (the right to a fair trial) and constitutes plain error (Pet. 17-18).

III.

The respondent's final argument is that the district court was within its discretion in permitting the representative from the Department of Labor to describe the basic requirements of the CETA program (Res. 7-8). Petitioner submits that the Federal Rules of Evidence and the case law would exclude the opinion testimony given by the Labor Representative (See Pet. 15-16). Petitioner would ask the Court to note that the respondent neglected to explain the

relevance of Hatch Act Testimony in a theft case where the accused was not charged in the indictment with violating the Hatch Act or subject to it. Finally, the petitioner submits that the trial judge improperly admitted the opinion evidence and violated his Sixth Amendment right to a fair trial.

CONCLUSION

For the reasons set forth in the Petitioner's petition, Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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